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In the Supreme Court of the United States

OCTOBER TERM, 1979

HOWARD SEAVEY WEBB, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

GERALD RICHARD JOHNS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly exercised its discretion in denying petitioners' motions for a mistrial based on the disclosure to certain jurors of information concerning the death of a witness.

2. Whether the evidence was sufficient for the jury to find that certain petitioners violated 42 U.S.C. 3631 and 18 U.S.C. 245(b)(5).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a)[1] is reported at 615 F.2d 672.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1980. The petition for a writ of certiorari in No. 79-1813 was filed on May 14, 1980; the petition in No. 79-6782 was filed on June 2, 1980, and was therefore out of time under former Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 42 U.S.C. 3631 provides in pertinent part:

> Whoever, whether or not acting under color of law, by force or threat of force willfully * * * intimidates or interferes with, or attempts to injure, intimidate or interfere with—
>
> (a) any person because of his race, color * * * and because he is or has been * * * occupying * * * any dwelling * * *
>
> shall be fined not more than $1,000, or imprisoned not more than one year, or both; * * *.

2. 18 U.S.C. 245(b) provides in pertinent part:

> Whoever, whether or not acting under color of law, by force or threat of force willfully * * * intimidates or interferes with, or attempts to injure, intimidate or interfere with—
>
> * * * * *
>
> (5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen

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[1] "Pet. App." refers to the appendix to the petition in No. 79-1813.

> from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color * * * in [applying for or enjoying employment, or any perquisite thereof, by * * * any agency of any State or subdivision thereof] or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—
>
> shall be fined not more than $1,000, or imprisoned not more than one year, or both * * *.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioners Mahlon W. Burchell, Joseph Ralph Stewart, Charles Randall Stewart, Thomas Aaron Smith, Arthur Dee Riley, William Eugene Massey, James Henry Bettis, and Gerald Richard Johns were convicted of intimidating and interfering with persons exercising a federally protected right, in violation of 18 U.S.C. 245(b)(5), and of conspiracy to commit that offense, in violation of 18 U.S.C. 371. Petitioners Howard Seavey Webb, William Roger Reynolds, Joseph Stewart, and Bettis were also convicted of violating the Fair Housing Act of 1968, 42 U.S.C. 3631(a), and, except for Bettis, of conspiracy to commit that offense, in violation of 18 U.S.C. 371. Petitioner Joseph Stewart was sentenced to four years' imprisonment. Petitioner Bettis was sentenced to concurrent terms of two years' imprisonment and six months' imprisonment. The remaining petitioners were each sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. 1a-5a).

The facts are set forth in detail in the opinion of the court of appeals (Pet. App. 2a-3a, 5a).

1. Petitioners were members or associates of a Ku Klux Klan chapter located in Talladega County, Alabama. Their chapter was concerned with the dating, social and living habits of bi-racial couples in Sylacauga, Alabama. On November 24, 1978, co-defendant Randy Charles Ward and petitioners Joseph Stewart, Reynolds, Webb, and Bettis were appointed to a "committee" to deal with this matter. They formulated and carried out a plan to fire a shotgun into a residence occupied by two black men and two white women (the Huntley residence).

On November 30, 1978, another "committee" was formed consisting of co-defendants Ward, Rickey Maness, Fred Holmes, Jr., and petitioners Joseph Stewart, Charles Stewart, Bettis, Burchell, Massey, Smith, Riley and Johns. The purpose of this "committee" was to curb efforts by the National Association for the Advancement of Colored People ("NAACP") to lobby on behalf of affirmative action programs for employment of black persons within the Sylacauga and Childersburg city governments. The method chosen to accomplish this purpose was the intimidation of Willie James Williams and Charles Woods, presidents, respectively, of the Sylacauga and Childersburg chapters of the NAACP. The members of this second "committee" formulated and carried out a plan to fire shotguns into the homes of Williams and Woods.

2. At the commencement of the trial, on June 4, 1979, the district court ordered the jury sequestered. Two days later a witness for the prosecution was killed in an unrelated incident. On June 11, 1979, the jury began its deliberations and the two alternate jurors were discharged. The following day the district court learned from the United States Marshal that one of the alternate jurors had inquired about a witness's death. The court held a hearing to determine what the alternate jurors knew about the

incident and what information, if any, they might have related to the other jurors about the homicide. One alternate juror testified that his wife had told him that a witness had been killed; he mentioned this information to the other alternate juror and to the jury foreman. Both alternate jurors testified that they were unaware whether the deceased was a witness for the government or the defense, and stated that they had not been intimidated or affected by the information. At the conclusion of the hearing, the district court denied defense motions for a mistrial, finding that petitioners had not been prejudiced.

On June 14, 1979, the jury returned its verdicts, in which petitioners were each acquitted on certain counts.[2] The district court then questioned each juror separately under oath concerning his or her knowledge concerning the witness's death. Only the foreman was aware of the incident and he testified that he had not attached any significance to it and had not connected the incident to petitioners' trial. The court concluded that the information was not prejudicial to the defense and refused to disturb its earlier ruling denying the motions for a mistrial.

ARGUMENT

1. Petitioners argue (79-1813 Pet. 5-7; 79-6782 Pet. 4-5) that they were prejudiced by the disclosure to the jury foreman of the witness's death, and that the district court therefore erred in denying their motions for a mistrial. As the court of appeals correctly concluded (Pet. App. 5a), however, "[t]he district court, after conducting a full hearing on the matter, properly exercised its discretion in overruling [petitioners'] mistrial motion." That conclusion does not warrant review.

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[2]In addition, three co-defendants were acquitted on all the counts with which they were charged.

Because the district court is in the position personally to observe the demeanor of the jury during the course of the trial, it has broad discretion in dealing with allegations of juror misconduct or prejudice. See *United States* v. *Barnes*, 604 F. 2d 121, 144 (2d Cir. 1979), cert. denied, No. 79-261 (Apr. 21, 1980); *United States* v. *Bufalino*, 576 F. 2d 446, 451-452 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United States* v. *Hendrix*, 549 F. 2d 1225, 1227-1229 (9th Cir.), cert. denied, 434 U.S. 818 (1977). Here, the inquiry conducted by the district court accorded with the procedures that this Court approved in *Remmer* v. *United States*, 347 U.S. 227, 229-230 (1954), and reflected a prudent exercise of discretion.

The court first questioned the alternate jurors separately and, following the verdicts, it questioned the remaining jurors in order to ascertain whether the disclosure of information concerning the witness's homicide had tainted the jury's consideration of the case against petitioners. During the hearing, counsel for petitioners were permitted to submit questions which the court directed to the jurors. The record amply supports the district court's finding, affirmed by the court of appeals, that petitioners were not prejudiced by the disclosure, and there is no reason for this Court to deviate from its settled practice not to disturb a factual finding concurred in by two lower courts. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967). In addition, the verdicts of acquittal as to each petitioner on certain counts (and as to three co-defendants on all counts) further demonstrate that the jury performed its duty conscientiously and decided the case on the basis of the evidence, without bias for or against petitioners. See *United States* v. *Barnes*, *supra*, 604 F. 2d at 144-145.

In sum, the district court properly inquired into the allegations of prejudice arising from the disclosure of

extrajudicial information to the jury, and found that the disclosure was not harmful to petitioners. See *United States* v. *Boyd*, 610 F.2d 521, 524-525 (8th Cir. 1979), cert. denied, No. 79-5896 (Feb. 19, 1980); *United States* v. *Pantone*, 609 F.2d 675, 679 (3d Cir. 1979); *United States* v. *Albert*, 595 F.2d 283, 290-291 (5th Cir. 1979), cert. denied, No. 79-207 (Nov. 26, 1979); *United States* v. *Fleming*, 594 F.2d 598, 608 (7th Cir.), cert. denied, 442 U.S. 931 (1979).

2. Petitioners apparently contend (79-1813 Pet. 7; 79-6782 Pet. 5) that the evidence was insufficient to support their convictions under 42 U.S.C. 3631 and 18 U.S.C. 245(b)(5). This contention was correctly rejected by the court of appeals (Pet. App. 3a-5a).

Petitioners assert that the acts of violence and intimidation in which they engaged were primarily motivated by prejudice against social contact between black men and white women, and that therefore their conduct was not punishable under 42 U.S.C. 3631 and 18 U.S.C. 245(b).[3] The court of appeals correctly rejected this claim (Pet. App. 4a), concluding that:

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[3]To the extent that petitioners claim that their conduct was punishable in state court but that they "did not know or care about the Federal laws charged" (79-1813 Pet. 7; 79-6782 Pet. 5), their claim is insubstantial, since ignorance of the law is no defense. See *United States* v. *Int'l Minerals & Chem. Corp.*, 402 U.S. 558 (1971); *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 67-69 (1910). The jury was required to find only that petitioners "willfully" sought to interfere with the exercise of rights by their victims; the jury did not have to determine whether petitioners in fact knew the federal character of those rights. See *United States* v. *Griffin*, 525 F. 2d 710, 712 (1st Cir. 1975), cert. denied, 424 U.S. 945 (1976). Cf. *United States* v. *Feola*, 420 U.S. 671, 685 (1975) ("The concept of criminal intent does not extend so far as to require that the actor understand not only the

> [t]he evidence supports the jury's finding that the [petitioners] shot into the Huntley residence to discourage both interracial living arrangements and interracial dating. The presence of other motives, given the existence of the [petitioners'] motive to end interracial cohabitation, does not make their conduct any less a violation of 42 U.S.C. § 3631. Under the circumstances of this case, the jury could well find that [petitioners] intended by their conduct to interfere with the exercise of the rights of the attacked individuals and others to live where they wish regardless of their race or color.

Similarly, there was ample evidence to support petitioners' convictions under 18 U.S.C. 245(b). The facts showed that by shooting into the residences of the NAACP leaders, petitioners sought to interfere with the NAACP's efforts to obtain better employment opportunities for blacks in local government. Petitioners' conduct thus clearly violated the provisions of Section 245(b)(5). See generally *United States* v. *Griffin*, 525 F. 2d 710, 711-712 (1st Cir. 1975), cert. denied, 424 U.S. 945 (1976); *United States* v. *Price*, 464 F.2d 1217, 1218 (8th Cir.), cert. denied, 409 U.S. 1040 (1972).

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nature of his act but also its consequence for the choice of a judicial forum.").

If petitioners are contending that Congress did not extend the jurisdiction of the federal courts to punish acts of racial violence such as those perpetrated here, their contention is refuted by the express language of 18 U.S.C. 245(b) and by the pertinent legislative history. S. Rep. No. 721, 90th Cong., 1st Sess. 3-6 (1967).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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